United States Department of Labor
Employees' Compensation Appeals Board

A.F., Appellant	)	
and	)	**Docket No. 17-1374**
	)	**Issued: March 19, 2019**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Calexico, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 5, 2017 appellant filed a timely appeal from a February 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the February 23, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a back injury causally related to the accepted July 15, 2016 employment incident.

FACTUAL HISTORY

On July 20, 2016 appellant, then a 44-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, on July 15, 2016, he injured his lower back in a work-related training exercise. He explained that he had been participating in a physical techniques role-playing training scenario when another participant (role player) inadvertently pulled his left foot out from underneath him. Appellant reported that he subsequently felt a strong pain shooting from his lumbar area to the base of his neck. He described his injury as a possible severe lower back strain. Appellant did not stop work.

In a November 2, 2016 initial progress report, Dr. Jean-Jacques Abitbol, a Board-certified orthopedic surgeon, noted that appellant complained of constant, slight-to-moderate diffuse low back pain with associated left lower extremity pain. He noted that appellant was injured in a July 2016 fight simulation when his opponent grabbed his foot and pulled it from underneath him. Appellant reported experiencing a sudden onset of low back pain. Dr. Abitbol further noted that appellant immediately reported his injury, but continued working. Appellant had not seen a physician until "today." On physical examination of the lumbar spine, Dr. Abitbol noted tenderness to palpation in the midline lumbar area and lumbosacral junction. He also reported limitations in lumbar range of motion, most prominently with respect to flexion (20/90 degrees). Lower extremity neurological examination was normal, bilaterally. Dr. Abitbol diagnosed low back pain. He recommended physical therapy and a lumbar corset to increase low back stability[3] and advised that appellant could return to full-duty work.

In a December 23, 2016 progress report, Dr. Abitbol noted complaints of slight-to-moderate diffuse low back pain without radiculopathy. He advised that appellant's symptoms remained unchanged since the last visit. Dr. Abitbol examined him, provided findings, and indicated that appellant was approved for physical therapy and a low back corset. He advised that appellant completed his first session of physical therapy and recommended additional therapy and follow-up in six weeks. Dr. Abitbol noted that, if physical therapy were to fail, he recommended a lumbar spine magnetic resonance imaging (MRI) scan. He continued to diagnose low back pain, and noted that appellant could return to full duty.

OWCP also received physical therapy notes dated December 28, 2016.

In a January 23, 2017 development letter, OWCP informed appellant that, when his claim was initially received, it appeared to be a minor injury resulting in minimal or no lost time from work. Based on this criteria and because the employing establishment did not controvert the continuation of pay or the merits of the claim, it had administratively approved payment of a limited amount of medical expenses. OWCP further informed appellant of the type of evidence

[3] OWCP subsequently authorized physical therapy, as well as the requested lumbar corset.

needed to support his claim and requested that he respond to an included questionnaire and provide additional medical evidence. It afforded appellant 30 days to submit the requested information.

OWCP subsequently received another copy of Dr. Abitbol's December 23, 2016 report, as well as additional physical therapy treatment records covering the period January 5 through 19, 2017.

By decision dated February 23, 2017, OWCP accepted that the July 15, 2016 employment incident occurred as alleged, but denied appellant's claim because he failed to establish a medical diagnosis in connection with the accepted employment incident. It concluded, therefore, that he had not met the requirements to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,[5] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[8] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[9] The second component is whether the employment incident caused a personal injury.[10] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[11]

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[4] *Id.*

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[9] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *D.D.*, Docket No. 18-0648 (issued October 15, 2018); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[12] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[13] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).[14]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a back injury causally related to the accepted July 15, 2016 employment incident.

The record includes physical therapy treatment records dating from December 28, 2016 to January 19, 2017. Because physical therapists are not considered a physician as defined under FECA, this evidence is of no probative value and is insufficient to establish entitlement to FECA benefits.[15]

In both his November 2 and December 23, 2016 reports, Dr. Abitbol diagnosed "Low back pain." In its January 23, 2017 claim development letter, OWCP properly advised appellant that pain is a symptom, not a valid medical diagnosis.[16] It also afforded appellant an opportunity to submit a narrative medical report from his physician, which included a medical diagnosis and an opinion on causal relationship. OWCP subsequently received another copy of Dr. Abitbol's December 23, 2016 follow-up progress report, which diagnosed low back pain. The Board has consistently held that a diagnosis of pain does not constitute a basis of payment for compensation, as pain is a symptom rather than a specific diagnosis.[17] As such, Dr. Abitbol's November 2 and December 23, 2016 reports are insufficient to establish a medical diagnosis in connection with the accepted July 15, 2016 employment incident.

Accordingly, the Board finds that appellant has not met his burden of proof to establish his traumatic injury claim.

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[12] *T.H.*, 59 ECAB 388, 393 (2008); *Robert G. Morris*, 48 ECAB 238 (1996).

[13] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[14] *Id.*

[15] *D.H.*, Docket No. 18-1159 (issued February 15, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA. Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits).

[16] Findings of pain or discomfort alone do not satisfy the medical aspect of the fact of injury medical determination. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.4a(6) (August 2012).

[17] *Robert Broome*, 55 ECAB 339, 342 (2004).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a back injury causally related to the accepted July 15, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 19, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board